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MM Docket No. 01-248  
RM-10241  
RM-10342

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**Released: February 6, 2004**

dated: February 6, 2004

tioner; (3) opposing comments by Coyote Communications and (6) other related pleadings.<sup>4</sup>

ed to Livingston, California.<sup>5</sup> In 1992, the City of Palos moved to California's Proposition 13, Proposition 130, and Proposition 131, and changed the community's name to Palos, California,<sup>6</sup> and modified the state's Proposition 131. The Palos reallocation would result

ies<sup>7</sup> by providing a first local a

1, Report No. 2519.

for leave to file response. Thereafter, Coyote filed a reply comments; the petitioner filed a reply to Coyote's reply; Coyote filed a reply to the petitioner's reply; and Coyote filed an opposition to the petitioner's motion for summary judgment (MSJ) on February 14, 2002. Through

and fulltime aural service; (3) first priorities (2) and (3).] *See Revision of*

service to Dos Palos under Priority (3). By comparison, retaining the station in Livingston would provide a third local service to Livingston under Priority (4).

3. Following the issuance of the Dos Palos construction permit, the Petitioner petitioned for the reallocation and change the community of license for Station KSKD(FM), Channel 240A, from Dos Palos to Chualar, California. The Petitioner claimed that the proposed reallocation complies with Section 1.420(i) of the Commission's Rules because Channel 240A at Dos Palos is mutually exclusive with Channel 240A at Chualar and an actual transmitter site exists at which full city-grade service can be provided to Chualar. Noting that Station KSKD(FM) continues to be operated from Livingston, the Petitioner argued in its rulemaking petition that the proposed reallocation will result in a preferential arrangement of allocations as compared to Livingston because the proposal will be a first commercial local service to Chualar whereas it would be a third aural service at Livingston. Finally, the Petitioner argued that this reallocation would not result in the removal of a sole local service from Dos Palos because the station is not on the air.

4. The *NPRM* recognized that, under the FM allocation priorities, retaining the station at Dos Palos would be a first local service under Priority (3) while the reallocation of the station to Chualar would trigger Priority (4), other public interest matters, because it would be a second local service. However, it solicited comment on the proposal and on whether to allow the removal of the sole potential local service to Dos Palos. Further, because the Chualar and Dos Palos transmitter sites are different, the *NPRM* requested the submission of a study of the theoretical gains and losses in area and populations that would be served by the Chualar and Dos Palos allocations and the number of reception services available in these areas.

#### COMMENT SUMMARY

5. In its supporting comments, the Petitioner reiterates its continuing interest to file an application for a construction permit to serve Chualar. In response to the *NPRM*'s request for gain and loss information, the Petitioner states that there would be a loss of a fourth service to an area of 55.2 kilometers that contains no persons and a loss of a fifth service to an area encompassing 651.3 kilometers and containing 211 persons. However, the Petitioner contends that this is not a loss of actual service since the Dos Palos facility is not on the air and that, in any event, it is *de minimis*.<sup>8</sup> The Petitioner also states that a reallocated Channel 240A at Chualar will provide 60 dBu service to 205,971 persons within 2,498.3 square kilometers, representing an increase of 56,316 persons over the present KSKD(FM) licensed facility in Livingston.

6. J&M, the licensee of Station KBOQ(FM), Carmel, California, opposes the Petitioner's proposed relocation of Station KSKD(FM) from Dos Palos to Chualar. J&M claims standing to file comments because the proposed transmitter site for Station KSKD(FM) at Chualar is close to the minimum permissible distance separation to Station KBOQ(FM) and, as a result, would limit its ability to change the KBOQ(FM) transmitter site. J&M argues that the proposal should not be adopted because it does not comport with FM allocation priorities and Section 307(b) of the Communications Act of 1934, as amended, because "[a]s the Commission noted in its *NPRM*, first local service [to Dos Palos] is the third priority, while second local service [to Chualar] is the fourth."<sup>9</sup> Further, J&M states that Dos Palos (pop. 4,581) is significantly larger than Chualar (pop. 1,444) and that, even if Chualar had no local service, Dos Palos would be favored because the Commission generally favors the more populous community when it considers where to allot a first local service. J&M also submits a number of letters from city officials, community leaders, and other residents of Dos Palos, supporting retention of the station in Dos Palos to meet the needs and interests of the community, especially for communications in times of emergencies. Finally, J&M alleges that the Petitioner's "... attempt to move Station KSKD(FM) from Dos Palos without

<sup>8</sup> See *Seabrook, Hunstville, TX, et al.*, 10 FCC Rcd 9360 (1995).

<sup>9</sup> J&M's Comments in Opposition at 2.

constructing there, and without providing any reason for not doing so, calls into question the *bona fides* of its original representations to the Commission that it intended to become a Dos Palos station”<sup>10</sup> and that “[t]he Commission should not reward [KSKD] for its improper actions . . . .”<sup>11</sup>

7. In its comments and counterproposal, Coyote proposes that Channel 240A be allotted as a first local service to Big Sur, California. This counterproposal is mutually exclusive with the *NPRM*’s proposal because Channel 240A at Big Sur is short-spaced to the proposed allotment of Channel 240A at Chualar.<sup>12</sup> In support of its counterproposal, Coyote claims that Big Sur is a community of about 1,500 persons located along scenic California Highway One in a significant area for tourism and has a variety of businesses, community outlets, services, and events. Coyote further argues that its counterproposal is a more efficient use of the spectrum because it triggers higher allotment Priority (3) as a first local service to Big Sur while the Petitioner’s proposal would be a second local service to Chualar under lower allotment Priority (4). Further, since Channel 240A at Big Sur is not short-spaced to Channel 240A at Dos Palos, Coyote contends that its counterproposal has the added benefit of retaining a first local service at Dos Palos.

8. Coyote also opposes the Petitioner’s proposal on three other grounds. First, Coyote contends that Chualar is not a community for allotment purposes but appears to be a bedroom community to farming activity in Monterey County. Based upon an affidavit of one of its principals, Coyote alleges that Chualar is comprised of three streets bisected by six cross-streets and appears to have a small post office, two churches, a public elementary school, two grocery stores, and a few other food establishments. Second, Coyote contends that since the proposed 70 dBu contour of the reallocated Station KSKD(FM) would cover 57% of the Salinas Urbanized Area, the Petitioner must submit a *Tuck*<sup>13</sup> showing that Chualar is sufficiently independent of Salinas to merit any service preference. Third, Coyote contends that the Petitioner should be held to its commitment made 18 months earlier in MM Docket 00-92 to build a station at Dos Palos and that the public interest requires some explanation by the Petitioner of its intentions to move Station KSKD(FM) from Livingston to Dos Palos to Chualar, a relocation of approximately 70 miles.

9. In its consolidated reply comments, the Petitioner argues that Coyote’s counterproposal must be dismissed for several reasons. First, the Petitioner alleges that Coyote has not submitted documentation to support its claim that Big Sur is a community for allotment purposes. Although this requirement is generally met if a community is either incorporated or listed in the U.S. Census, the Petitioner asserts that Big Sur is not incorporated or listed in the U.S. Census, and that, under these circumstances, Coyote was required to demonstrate by the testimony of local residents or by objective factors that Big Sur is a “geographically identifiable population grouping.”<sup>14</sup> Second, the Petitioner contends that the failure to submit the required documentation of community status with its counterproposal violates the policy that counterproposals are required to be “technically correct and substantially complete” at the time they are filed<sup>15</sup> and should lead to the rejection of the counterproposal as in *Pike Road and Ramer, AL*.<sup>16</sup> Third, the Petitioner argues that local area residents refer to Big Sur as an area extending approximately 25 miles of

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> See 47 C.F.R. § 73.207. The required spacing between Channel 240A at Big Sur and Channel 240A at Chualar is 115 kilometers whereas the actual spacing between these proposals is 49.6 kilometers.

<sup>13</sup> *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

<sup>14</sup> Petitioner’s Consolidated Reply Comments at 2, citing *Benavides, Bruno, and Rio Grande, TX*, 13 FCC Rcd 2096 (MMB 1998).

<sup>15</sup> Petitioner’s Consolidated Reply Comments at 2, citing *Fort Bragg, CA*, 6 FCC Rcd 5817 (MMB 1991); *Provincetown, Dennis, Dennis Port, West Yarmouth and Harwich Port, MA*, 8 FCC Rcd 19 (MMB 1992); and *Sanford and Robbins, NC*, 12 FCC Rcd 1 (MMB 1997).

<sup>16</sup> 10 FCC Rcd 10347 (MMB 1995).

coastline and that the counterproposal must be dismissed for failure to provide city-grade coverage to this entire area since the city-grade coverage of a Class A station would extend no more than 16.2 kilometers (10.1 miles) from the transmitter. Fourth, the Petitioner alleges that even if acceptable, the Big Sur proposal should be denied as an inefficient use of the spectrum because it would provide service to 6,550 persons. By way of contrast, the Petitioner claims that reallocating Channel 240A to Chualar would provide 60 dBu service to 56,316 persons over the present KSKD(FM) licensed facilities in Livingston as well as improved service to 154,648 more persons than would have been provided by the construction of Channel 240A at Dos Palos, for a total service of 204,817 persons. Alternatively, the Petitioner argues that if these defects were overlooked, Channel 236A is available for allotment to Big Sur in lieu of Channel 240A. The use of the alternative channel would make possible the grant of both the Chualar and Big Sur proposals.

10. With respect to Coyote's allegations that Chualar is not a community for allotment purposes, the Petitioner asserts that Chualar is listed in the U.S. Census and has been afforded community status because Station KHAD(FM) is already licensed to the community. The Petitioner contends that nothing submitted by Coyote establishes a basis for removing that status. Likewise, the Petitioner argues that Coyote's claim that a *Tuck* showing is required is incorrect because Coyote appears to have taken into account actual terrain in calculating Urbanized Area coverage. Petitioner contends that it has not determined whether it would construct at the reference coordinates. In these circumstances, Petitioner claims that Coyote's reliance on *Woodstock and Broadway*<sup>17</sup> to calculate Urbanized Area coverage is misplaced. Petitioner contends that using the routine FM allotment methodology, which assumes class maximum HAATs along all critical radials, the Chualar proposal would cover only 2.2% of the Salinas Urbanized Area with a 70 dBu signal.

11. Coyote requests leave to file a response to the Petitioner's consolidated reply, arguing that the Petitioner has made misstatements of facts and applicable precedent and that acceptance of its response will assure that the Commission has a full, complete, and accurate record. The Petitioner opposes Coyote's request for leave to file response, contending that it should not be considered because the Commission's Rules do not provide for the filing of a response to reply comments.<sup>18</sup> However, to the extent that Coyote's response may be considered, the Petitioner reiterates that the counterproposal is defective because Coyote did not meet its burden of establishing that Big Sur is a community in the body of its counterproposal.

12. In response to the *Public Notice* of its counterproposal, Coyote submits reply comments, seeking to demonstrate further the community status of Big Sur. Although the community does not have definable boundaries and is not a census designated place, Coyote argues that its 1500 residents are a distinct population grouping and that its economy revolves around tourism. Coyote documents among its community attributes hotels, two resorts, restaurants, stores, art galleries, gas stations, a Chamber of Commerce, a post office, two churches, an elementary school, a library, medical facilities, a volunteer fire department, and several state and federal government offices. Coyote also submits statements from business owners and residents, stating their beliefs that Big Sur is a community.

13. The Petitioner filed a motion to strike Coyote's reply comments and a supplement to motion to strike, reiterating that Coyote's pleading goes beyond the scope of its permitted reply.<sup>19</sup> The Petitioner further argues that Coyote did not serve copies of its pleadings on all parties to the proceeding. In an opposition to the Petitioner's motion to strike and supplement, Coyote contends that the Petitioner has not

<sup>17</sup> 3 FCC Rcd 6398 (1988).

<sup>18</sup> See, e.g., *Rosendale, NY*, 10 FCC Rcd 11471 n.4 (MMB 1995).

<sup>19</sup> In its motion to strike, the petitioner also argues that Coyote's reply comments should not be accepted because the Commission's Rules do not provide for the filing of a response to reply comments. However, the petitioner withdraws this argument in its supplement to motion to strike, recognizing that Coyote's counterproposal had been placed on *Public Notice*.

cited a rule or precedent limiting the scope of Coyote's reply. On the contrary, since the reply comments were filed in response to a *Public Notice* on its counterproposal, Coyote argues that it is proper to submit information about Big Sur. Coyote further contends that its oversight in not serving a copy of the reply comments on J&M should not be a basis for striking the reply because service was subsequently accomplished. Coyote also alleges that J&M was not prejudiced by the delay in service because J&M has opposed the Petitioner's proposal, not Coyote's counterproposal.

## DISCUSSION

14. After carefully considering the record in this proceeding, we will deny the reallocation and change of community of license for Station KSKD(FM), Channel 240A, from Dos Palos to Chualar, California, but will allot Channel 240A to Big Sur, California. As explained below, we reach these results without the need for a comparative analysis of the proposals.

### Procedural Issues

15. As a threshold matter, we must resolve several procedural issues. First, we will deny Coyote's request for leave to file a response to the petitioner's consolidated reply comments. The Commission's Rules do not provide for the filing of pleadings beyond the comment and reply comment period unless specifically requested or authorized by the Commission.<sup>20</sup> Since Coyote's response was filed after the reply comment period set forth in the *NPRM*, it is unauthorized and will not be considered. Further, we believe that the *Public Notice* announcing consideration of Coyote's counterproposal provided adequate opportunity for Coyote to submit in its reply comments thereto additional information about Big Sur and to comment upon alternate channels suggested by the Petitioner. Indeed, Coyote did so, obviating the need to consider the instant pleading.

16. Second, we find that Coyote's counterproposal should not be dismissed on procedural grounds because it is technically correct and substantially complete. While counterproposals have been generally dismissed for technical defects or, in some instances, for legal deficiencies,<sup>21</sup> the Petitioner has not cited a case where a counterproposal was dismissed for failure to provide information regarding community status within the body of the counterproposal.<sup>22</sup> On the contrary, while counterproposals are expected to be technically correct and substantially complete, "we do not absolutely prohibit minor curative submissions." For example, reimbursement commitments were not timely submitted in counterproposals but were permitted in reply comments.<sup>23</sup> Likewise, in *Three Lakes, Newbold, Nakoosa, and Port Edwards, WI*,<sup>24</sup> a request for supplemental information was issued, requesting a counterproponent to provide indicia of community status. Under these circumstances, we find that Coyote's counterproposal is acceptable for consideration and that any deficiencies that are not cured would affect the grantability of the proposal. Our view is further buttressed by the fact that no prejudice would occur to the Petitioner by consideration of the counterproposal because an alternative channel is available for allotment to Big Sur, making it theoretically possible to grant both mutually exclusive proposals.

<sup>20</sup> § 1.415(d). See, e.g., *Cherry Valley and Cotton Plant, Arkansas*, 14 FCC Rcd 13543, 13544 n.6 (MMB 1999) (late filed reply comments not considered); *Berlin, De Forest, Markesan, and Wautoma, Wisconsin*, 10 FCC Rcd 7733 n.3 (MMB 1995) (late file reply comments were unauthorized and not accepted).

<sup>21</sup> See *infra* note 15.

<sup>22</sup> The petitioner's reliance on *Pike Road and Ramer, AL*, 10 FCC Rcd 10347 (MMB 1995), is misplaced because a counterproposal originally accepted and placed on Public Notice was subsequently denied for failure to establish community status. Unlike the instant case, no attempt was made to supplement the community information set forth in the counterproposal.

<sup>23</sup> *Boalsburg, PA, et al.*, 7 FCC Rcd 7653 (MMB 1992).

<sup>24</sup> 8 FCC Rcd 763 (MMB 1993).

17. Third, we deny the Petitioner's motion to strike Coyote's reply comments. Coyote's pleading is authorized because it was filed in response to the *Public Notice*, seeking reply comments to the counterproposal. Further, Coyote did not exceed the scope of its permitted reply. As we have previously explained, "[t]he purpose of the reply comment period [in a Public Notice of a counterproposal] is to allow all interested parties to respond to pleadings filed during the initial comment period and to call to the Commission's attention possible solutions to or defects in mutually exclusive requests."<sup>25</sup> Since Coyote was providing additional information on an issue previously raised in its counterproposal, the community status of Big Sur, the reply comments fits within our stated purpose for this additional reply comment period. Finally, Coyote's oversight in not serving a copy of its reply comments is harmless error because service was subsequently accomplished.

### Petitioner's Proposal

18. Chualar qualifies as a community for allotment purposes due to its inclusion in the U.S. Census and the presence of indicia of community status such as businesses, churches, and an elementary school. We deny, however, the proposed reallocation and change of community of license for Station KSKD(FM), Channel 240A, from Dos Palos to Chualar. As correctly pointed out in the *NPRM* and in the oppositions of J&M and Coyote, the Petitioner's proposal cannot be granted because it will not constitute a preferential arrangement of allotments under the FM allotment priorities as required in *Modification of FM and TV Authorizations to Specify a New Community of License*.<sup>26</sup> Specifically, the retention of Station KSKD(FM) would provide a first local service under Priority (3). By comparison, reallocating Channel 240A and changing the community of license for Station KSKD(FM) to Chualar would be a second local service, triggering lesser Priority 4, other public interest matters.

19. We disagree with Petitioner's contention that the appropriate comparison should be between Livingston and Chualar because Station KSKD(FM) is still licensed to Livingston and is operating as a station there. As with the grant of a one-step FM commercial station application to change channel or station class, the grant of a rulemaking petition to reallocate an FM channel and to change the community of license of a station ". . . amends the table of allotments and modifies that station to operate on the new channel and/or class. During the construction permit period, the licensee may continue to operate the previously authorized facilities on an interim or 'implied Special Temporary Authority' basis."<sup>27</sup> This is exactly the position that the Petitioner is in. It has an implied STA to operate at Livingston. However, its Channel 240A has been reallocated to Dos Palos, and its license has been modified accordingly. Under these circumstances, the appropriate comparison under Section 307(b) of the Communications Act of 1934, as amended, is between Dos Palos and Chualar, even though the Dos Palos station is not built.

20. Since we are not granting the Petitioner's proposal, we need not address the issue of the *bona fides* of the Petitioner in representing to the Commission in the earlier rulemaking proceeding that it intended to build the station at Dos Palos. However, we would like to clarify two issues. First, although we have generally applied the *Woodstock and Broadway*<sup>28</sup> exception to our presumption of uniform terrain to determine compliance with Section 73.315(a) of the Commission's Rules in cases of upgrades by existing stations and occasionally in changes of community of license,<sup>29</sup> it appears that we have not addressed the

<sup>25</sup> *Corinth, Hadley, and Queensbury, NY*, 2 FCC Rcd 3316, 3317 n.3 (MMB 1987), *recon. denied*, 4 FCC Rcd 5709 (MMB 1989), *app. for rev. denied*, 5 FCC Rcd 3243 (1990).

<sup>26</sup> See *supra* note 6.

<sup>27</sup> 1998 Biennial Regulatory Review - *Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 13 FCC Rcd 14848, 14855 n.22 (1998).

<sup>28</sup> See *supra* note 17.

<sup>29</sup> See, e.g., *Freemont and Sunnyvale, CA*, 16 FCC Rcd 20530, 20531-20532 (MMB 2001); and *Tullahoma, TN and Madison, AL*, 15 FCC Rcd 6189, 6190 (MMB 2000).

issue of whether to apply *Woodstock and Broadway* for Urbanized Area coverage. We believe that if an existing station can avail itself of the *Woodstock and Broadway* exception to determine compliance with Section 73.315(a), *Woodstock and Broadway* can also be used to determine whether 50% or more of an Urbanized Area would be covered by a 70 dBu signal, warranting a *Tuck* showing, when a station is proposing to move from a community located outside of an Urbanized Area to another community located outside of but proximate to an Urbanized Area. However, this exception, which takes into account actual terrain, may only be utilized by the rulemaking proponent, not an opposing party. Only a proponent has control over *Woodstock and Broadway* requirements, e.g., obtaining reasonable assurance of the availability of the actual transmitter site that will be utilized to implement the change of community proposal, a willingness to use this site, obtaining FAA approval, etc. Since the Petitioner states that it is uncertain whether it would construct at the proposed reference coordinates for Chualar, we believe that it is inappropriate to use *Woodstock and Broadway* for Urbanized Area coverage in this case.<sup>30</sup>

### Coyote's Counterproposal

21. We next find that the public interest would be served by allotting Channel 240A to Big Sur, California, because it will provide a first local service to that community. Although Big Sur (pop. 1500) is not incorporated or listed in the U.S. Census, Coyote has demonstrated sufficient indicia of community status such as hotels, resorts, restaurants, businesses, churches, schools, and the testimony of local residents.<sup>31</sup> Channel 240A can be allotted at the Petitioner's proposed site, which is located 2.7 kilometers west of Big Sur.<sup>32</sup> While the Petitioner argues that there will not be city-grade coverage to Big Sur because it is an area extending 25 miles, we disagree. On the contrary, Coyote has provided reference coordinates for the community of Big Sur from the *Rand McNally Commercial Atlas* and has submitted an engineering exhibit showing that the 70 dBu signal of the station would cover Big Sur.<sup>33</sup>

22. Pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.2.4(b), and 0.283 of the Commission's rules, IT IS ORDERED, That effective March 22, 2004, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
Big Sur, California	240A

<sup>30</sup> Generally, *Tuck* showings are required in reallocation and change of community license cases to justify a first local service. There appears, however, to be a split of authority as to the applicability of *Tuck* in situations where the proposed reallocation would result in a second local service to a community. For example, in *Tullahoma, TN and Madison, AL*, 18 FCC Rcd 17636 (MB 2003), we recently stated that *Tuck* is not applicable in cases of second local service. However, in *Ankeny and West Des Moines, Iowa*, 15 FCC Rcd 4413, 4414 n.3 (MMB 2000), a station proposing a reallocation and change of community of license to a community located within an Urbanized Area was required to submit a *Tuck* showing to justify a second local service under Priority (4) to prevent attribution of all the stations located in the Urbanized Area to the new community. The apparent rationale for this approach was that no *Tuck* showing was undertaken in connection with the first local service to that community because the station operating in that community was a noncommercial educational FM station. We believe that the *Ankeny and West Des Moines* approach is preferable and clarify that *Tuck* showings should be performed to justify second local service to a community when no *Tuck* showing was done in connection with the first local service to that community, establishing the independence of the community from an Urbanized Area. We envision that this situation could occur if the first local service in that community is either a noncommercial educational FM station or a new commercial "drop-in" FM allotment.

<sup>31</sup> See *supra* para. 12.

<sup>32</sup> The reference coordinates for Channel 240A at Big Sur are 36-15-28 and 121-49-28.

<sup>33</sup> See Coyote's Comments and Counterproposal, Engineering Exhibit, Figure 2.

23. IT IS FURTHER ORDERED, That the petition for rulemaking filed by KNT0, Inc. (RM-1041) IS DENIED.

24. IT IS FURTHER ORDERED, That the counterproposal (RM-10342) filed by Coyote Communications, Inc. IS GRANTED.

25. IT IS FURTHER ORDERED, That the request for leave to file a response filed by Coyote Communications, Inc. IS DENIED.

26. IT IS FURTHER ORDERED, That the motion to strike filed by KNT0, Inc. IS DENIED.

27. A filing window for Channel 240A, Big Sur, California, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent order.

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

29. For further information concerning this proceeding, contact Andrew J. Rhodes, Audio Division, Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Assistant Chief, Audio Division  
Media Bureau